

APPENDIX

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Sec. 2 . . . Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers. . . .

Sec. 8 The congress shall have power — to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

Sec. 9 . . . No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. . . .

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

Act of February 24, 1919: 40 Stat. 1096, entitled: "An act to provide revenue, and for other purposes."

Sec. 401 That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States,

1 per centum of the amount of the net estate not in excess of \$50,000;

2 per centum of the amount by which the net estate exceeds \$50,000 and does not exceed \$150,000;

3 per centum of the amount by which the net estate exceeds \$150,000 and does not exceed \$250,000;

4 per centum of the amount by which the net estate exceeds \$250,000 and does not exceed \$450,000;

6 per centum of the amount by which the net estate exceeds \$450,000 and does not exceed \$750,000;

8 per centum of the amount by which the net estate exceeds \$750,000 and does not exceed \$1,000,000;

10 per centum of the amount by which the net estate exceeds \$1,000,000 and does not exceed \$1,500,000;

12 per centum of the amount by which the net estate exceeds \$1,500,000 and does not exceed \$2,000,000;

14 per centum of the amount by which the net estate exceeds \$2,000,000 and does not exceed \$3,000,000;

16 per centum of the amount by which the net estate exceeds \$3,000,000 and does not exceed \$4,000,000;

18 per centum of the amount by which the net estate exceeds \$4,000,000 and does not exceed \$5,000,000;

20 per centum of the amount by which the net estate exceeds \$5,000,000 and does not exceed \$8,000,000;

22 per centum of the amount by which the net estate exceeds \$8,000,000 and does not exceed \$10,000,000; and

25 per centum of the amount by which the net estate exceeds \$10,000,000.

Sec. 402 That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Sec. 407 That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally

determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 408 That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409 That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

MASSACHUSETTS GENERAL LAWS, CHAP. 65

Section 1. [In part] All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except . . . , shall be subject to a tax at the percentage rates fixed by the following table:

[Then follow rates depending on the relationship of the recipient to the deceased and the amount of property received.]

DEC 8 1922

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 22

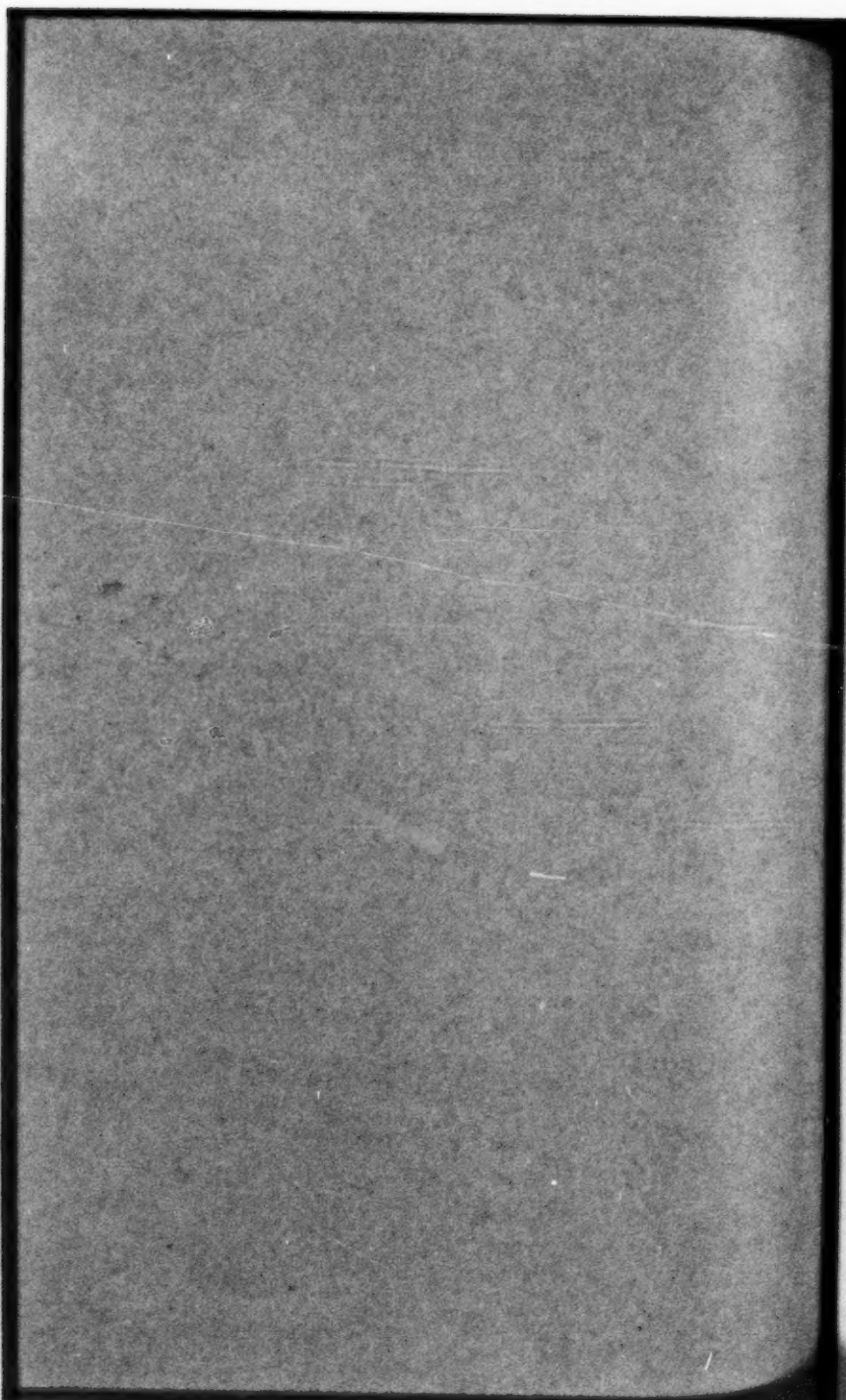
MALCOLM B. NICHOLS, Collector of Internal Revenue
of the United States for the District of Massachusetts,
Plaintiff in Error,

HAROLD J. COOLIDGE and AUGUSTUS P. LORING,
Executors of the Will of John Coolidge,
Defendants in Error.

ON ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MASSACHUSETTS.

WRIT OF HABEAS CORPUS.

ARTHUR F. MURPHY,
Attorney at Law,
Boston, Mass.



In the Supreme Court of the United States

OCTOBER TERM, 1926.

No. 88.

MALCOLM E. NICHOLS, Collector of Internal Revenue
of the United States for the District of Massachusetts,
Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and **AUGUSTUS P. LORING**,
Executors of the Will of Julia Coolidge,
Defendants in Error.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MASSACHUSETTS.**

BRIEF OF AMICI CURIAE.

This brief is presented for the purpose of directing attention to the fact that the case of *Shukert vs. Allen*, No. 193, October Term, 1926, will soon be argued and submitted to this Court.

The questions involved in the instant case are similar to some of the questions that are presented by the record in *Shukert vs. Allen*. Briefly, the facts in that case are as follows:

STATEMENT.

On May 5, 1921 Gustave E. Shukert transferred to United States Trust Company of Omaha, Nebraska, by trust deed, absolute in form, certain personal property, consisting of liberty bonds and notes secured by real estate mortgages of the actual value of \$190,157.55. The conveyance was in trust for the use and benefit of three children of the creator. It was an unconditional conveyance and took immediate effect, the property described in the trust was delivered to the trustee and is now and ever since the conveyance was made has been held by the trust company. The conveyance was voluntary and without consideration. By this trust conveyance there was a transfer of property from the founder to the trustee for the benefit of the beneficiaries named therein. The income of the trust fund so created was to accumulate in the hands of the trustee until the termination of the trust. The trust was to continue for a period of thirty years, that is, until February 1, 1951, unless the death of the last survivor of the beneficiaries named occurred more than twenty one years prior to February 1, 1951, in which case, said trust was to terminate twenty one years after the death of the last survivor. The sole beneficiaries of the trust were the founder's children. At the termination of the trust these children were to receive the principal and accumulated income, share and share alike. There was no power reserved to the founder or any other person to modify, change or alter any of the terms or conditions of the trust. There were no reservations of power or control over the property described in the trust. The trust was irrevocable. One provision in it provided that in the event of the death of a beneficiary, without issue, the other beneficiaries became the owners of the interest of the deceased beneficiary. By this provision,

the founder deprived himself of the right to inherit the property of the beneficiaries in the event of their death.

At the time this trust was created, the founder was just past 56 years of age. On September 29, 1921, four months and twenty-four days after creating the said trust, the founder died, testate, at Omaha, Nebraska. By his will, made two days before his death, he disposed of all the estate of which he died seized and appointed Elizabeth F. Shukert and Isabel C. Shukert as executrices of his estate.

After his death, the executrices filed with the Collector of Internal Revenue, in the manner required by the Revenue Act of 1918, the return of said estate for federal estate taxes. They included in this report all of the property of the estate of Gustave E. Shukert, of which he died seized. They did not include in this return the value of the property transferred in the deed of trust of May 3, 1921, for the reason that they believed and claimed that said transfer was not "*made in contemplation of or intended to take effect in possession or enjoyment at or after his death,*" within the meaning of the provisions of sub-paragraph (c) of Section 402 of the Revenue Act of 1918.

Afterward, on the final account and review of the return so filed by the executrices, the Commissioner of Internal Revenue included in "the gross value of the estate of decedent" the property transferred by the trust agreement aforesaid and assessed additional taxes against said estate on account thereof in the sum of \$13,685.47. This additional tax was paid, under protest, claim made for refund, which claim was rejected by the Revenue Department. Still later, the executrices began the action

of Shukert vs. Allen to recover the additional estate tax so paid.

On the trial in the District Court of Nebraska, the court held that the tax was valid and instructed the jury to return a verdict in favor of the defendant. The opinion of the trial court was reported in 300 Fed. 754. From this judgment an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. There the judgment of the trial court was affirmed. *Shukert vs. Allen*, 6 Fed. (2nd.) 551. From that order and judgment an application for writ of certiorari was made, which writ was allowed by this Court on the 19th of October, 1925. 70 L. ed. 26.

The Commissioner of Internal Revenue levied the taxes in dispute on the theory that the trust agreement "was made in contemplation of death." Both sides proceeded with the trial of the case on that theory. After all the evidence had been introduced, the trial court suggested that under the provisions of sub-paragraph (c) of Sec. 402 of the Revenue Act of 1918 there were two kinds of trusts subject to taxation. First, trust made in contemplation of death. Second, trusts that did not take effect until at or after the death of the creator.

Following this, the trial court held that under the terms of this trust agreement, the beneficiaries were to come into the enjoyment and possession of the property after the death of the founder and, therefore, this trust by its terms took effect after the death of the creator.

Stating it in another way: the trial court held that the beneficiaries did not come into the possession or enjoyment of the trust property until the date on which the trust ended.

Among the questions presented for review is: When does a beneficiary "come into the possession and enjoyment" of trust property that is delivered to a trustee under the terms of an executed trust that contains no conditions, restrictions or reservations.

ARGUMENT.

We will not cite authorities or advance arguments other than to state:

1. That an estate tax, under the provisions of Section 492, is a tax in the nature of a death duty and is levied on the right or privilege of transferring or transmitting the property from the dead to the living. When the transfer is made in contemplation of death or is made in a way that the death of the donor passes the title to the property to the beneficiaries, estate taxes can be levied.

2. Where a donor conveys property absolutely, by a trust agreement, and surrenders possession of the property to the trustee, it is an executed trust and takes effect *in presenti*. The trustee holds possession for the benefit of the beneficiaries, who begin to enjoy the trust on the date that it is created and possession of the property surrendered. The title to the property passes from the donor to the trustee and beneficiaries and the interests of the parties are fixed and become vested on the date of the execution of the trust and not at the end of the trust period.

3. The trust agreement executed by Mr. Shukert deprived him absolutely and unconditionally of the posses-

sion and enjoyment of the property conveyed by him. The possession passed from him to the trustee for the benefit of the beneficiaries and the beneficiaries immediately received a present interest and began to enjoy the benefits of the trust agreement.

4. Under the terms of the trust agreement, the death of Mr. Shukert in no way affected or changed the rights or the interests of either the trustee or the beneficiaries.

If the rules adopted in *Shukert vs. Allen* by the trial court and approved by the Circuit Court of Appeals is the law, then all executed trusts, whenever made, are subject to estate taxes if the end of the trust period occurs after the death of the creator.

The importance of the questions presented is such that we deem it our duty to briefly state the facts and to ask that the questions involved in *Shukert vs. Allen* be left undetermined until we can render such assistance as we may be able to give in our brief and by oral argument.

Respectfully submitted,

ARTHUR F. MULLEN,

ANTIONETTE FUNK,

Amici Curiae.

November 30, 1926.